

**American Arbitration Association
Commercial Arbitration Rules and Tribunal
Case No. 01 17 0002 1672**

ARBITRATION AWARD AND ORDER

JAMES SABATINO,

CLAIMANT,

and

USA SWIMMING, Inc.

RESPONDENT.

Pursuant to the Commercial Rules of the American Arbitration Association (AAA), the Arbitrator, Connie L. Peterson, heard oral arguments in the case on August 30, 2017. Claimant James Sabatino was present at the Hearing, along with his counsel Paul J. Greene and Matthew Kaiser, Global Sports Advocates, LLC, Portland, Maine. Respondent was represented by its counsel Brent Rychener, Bryan Cave, LLP, Colorado Springs, Colorado and Lucinda McRoberts, Secretary and General Counsel.

Having reviewed the record of the proceedings from the hearings regarding the Claimant before the Respondent (Record or ROA), heard arguments and allegations of the parties and considered the documents submitted in this case, the Arbitrator issues the following Arbitration Award and Order as follows:

Introduction

Jurisdiction for this arbitration arises from the Ted Stevens Olympic and Amateur Sports Act of 1978 (Sports Act.) *See* 36 U.S.C. 220522 (a) (4). The United States Olympic Committee (USOC) recognizes the Respondent as the National Governing Body for the sport of swimming under the Sports Act. Procedures under Section 9 of the USOC Bylaws are not applicable in this arbitration; therefore, AAA jurisdiction is dependent solely on the Sports Act.

Respondent USA Swimming filed a complaint against Claimant Sabatino alleging that he acted with inappropriate kissing, hugging and sexual comments toward a USA Swimming member athlete (Athlete A) from

2010-2012. A National Board of Review (NBR) Panel held a hearing on the allegations in the complaint and on November 28, 2016, issued its decision on December 2, 2016 (NBR Decision) that Claimant Sabatino's conduct with Athlete A violated Articles 304.3.5 and 304.3.15 of the 2010 Code of Conduct, Articles 304.3.7 and 304.3.17 of the 2011 Code of Conduct, Articles 304.3.8 and 304.3.18 of the 2012 Code of Conduct and Article 305.1 of 2011 and 2012 Athlete Protection Policies by a preponderance of the evidence. The NBR Panel then ordered that Claimant Sabatino was permanently suspended from membership and that his name placed on the published list of *Individuals Permanently Suspended or Ineligible*.

Claimant Sabatino appealed the NBR Decision to the USA Swimming Board of Directors (Board of Directors) which upheld and confirmed the NBR Decision on March 21, 2017.

Findings and Analysis

Claimant's arbitration claim seeks to overturn the NBR Decision that was affirmed by the Board of Directors. Claimant alleges that the disciplinary proceedings lacked fundamental fairness and that the Decision was arbitrary and capricious. Two of Claimant's specific claims allege that the NRB panel made a finding without expert witness foundation that Claimant "groomed" Athlete A for sexual conduct and that the punishment imposed by the NRB Panel and the Board of Directors was too harsh and, therefore, arbitrary.

Claimant's burden of proof in this arbitration is to show by a preponderance of the evidence that more likely than not, the disciplinary proceedings lacked fundamental fairness, the decision was arbitrary and or capricious or the NRB Panel and the Board of Directors were motivated by prejudice, bias or bad faith.

This Arbitration Award and Order is based on the totality of the Record, giving such evidence its appropriate weight and drawing all reasonable inferences, therefrom. The evidence cited in this Arbitration Award and Order is illustrative of the totality of evidence found in the Record. Any reference to specific evidence in this Arbitration Award and Order is not to be construed as reflecting the Arbitrator's conclusion that it is the sole or even the most significant evidence supporting a finding or conclusion. This Arbitration Award and Order summarily explains some, but not all, of the Arbitrator's analysis.

Claimant's request for a *de novo* hearing in this arbitration was denied and, as a result, this arbitration included a review of the Record and argument on the Record before the NBR Panel and Board of Directors. Based on established authority, this arbitration hearing has been limited to a review of the Record to determine whether

Respondent's hearing process lacked fundamental fairness or whether the disciplinary decision was arbitrary, capricious or in bad faith. See e.g. *Butler v. USA Volleyball*, 673 N.E. 2d 1063 (Ill. App. 1996); *Booth v. US Rowing Ass'n*, AAA Case 30-19000-2259-07.

Although disciplinary proceedings conducted by voluntary associations do not require strict compliance with judicial standards of due process (*Butler* at 1066) Respondent's procedures were fundamentally fair. Claimant Sabatino complains that the time allotted his counsel was too restrictive; however, this complaint concerns approximately 10 minutes of time and there is no indication of prejudice to the Claimant in the Record. Claimant fully testified at the hearing before the NBR Panel as did his witnesses. Claimant Sabatino points out inconsistencies of testimony and other evidence and argues that Athlete A's and her mother's testimony was not credible. The Record shows that the NBR Panel considered testimony favorable to the Claimant but found other witnesses more credible. It was the duty of the NBR Panel to judge the credibility of witnesses and other evidence and of the weight to be given to the evidence presented.

Claimant Sabatino argues that the NBR Panel conclusion that "the fact that Athlete A and her mother failed to tell friends or police about his behaviors or their concerns about those behaviors to be consistent with the current understanding of the impact of 'grooming' or sexual misconduct on its victims" was error because the conclusion could only properly be made as a result of expert testimony supporting that conclusion. This claim fails.

This case and *In re Pers. Restraint Phelps* on which Claimant relies are easily distinguished. The *Phelps* case involved prosecutorial conduct before a jury in Court and the appellate Court found that the prosecutor's argument encompassed issues that were beyond the jury's common understanding. Here, it appears from the Record that the NBR Panel consisted of a diverse panel knowledgeable with USA Swimming and the sport. The Panel could properly make conclusions based on its own knowledge and experience. The hearing before the NBR Panel was not a Court trial and there was no requirement that the NBR Panel strictly apply Court rules of evidence. Here, the conclusion was made by the finders of fact not urged upon a lay jury by a prosecutor. "Grooming" was only one conclusion following extensive findings of fact by the NBR Panel.

The Record shows that the discipline to the Claimant was not based on a finding of "grooming" but that the term was used to generally describe his conduct. Rather, the NBR Panel imposed the discipline tied to a long list of findings of fact that were analyzed to the alleged violations of specific sections of the Codes of Conduct alleged in

the complaint filed by Respondent.

Claimant Sabatino further alleges that Respondent acted arbitrarily and capriciously by imposing a punishment too severe on Claimant. Claimant argues that the sanction is “overly harsh and, therefore, arbitrary and capricious. Claimant stated on p.10 of his memorandum of law that “even assuming *arguendo* that all of the evidence presented by USA Swimming is true, Mr. Sabatino’s conduct does not rise anywhere near a level that warrants permanent suspension.”


Claimant cites *Kazmi v. Dept. of Fin. & Prof'l Regulation*, 2014 Il. App. (1st) 130959 as support for his argument but *Kazmi* is opposite.

Once the NRB Panel found Respondent’s witnesses credible, the Panel, turning to the imposition of appropriate sanctions against Claimant, could properly consider the duration of the conduct, the growing escalation of the conduct, the age of the swimmer, swimmer safety, Claimant Sabatino’s unwillingness to accept responsibility for the conduct, etc. See *Kazmi*.

Arbitration Award and Order

1. Claimant failed to meet his burden of proof by a preponderance of the evidence that the disciplinary proceeding lacked fundamental fairness, the decision was arbitrary or capricious and NBR Panel and Board of Directors were motivated by prejudice, bias or bad faith.
2. The NBR Panel’s Decision dated December 2, 2016, is supported by the Record.
3. The Decision of the Board of Directors of USA Swimming, Inc. dated March 21, 2017, is affirmed.
4. Mr. Sabatino’s claims in this arbitration are denied.
5. The administrative fees of the American Arbitration Association and the compensation of the Arbitrator shall be borne as incurred.
6. This Arbitration Award is in full settlement of all claims submitted in the arbitration. All claims not expressly granted, herein, are denied.

Dated: September 2, 2017


CONNIE L. PETERSON
ARBITRATOR